(d) During the marriage Chew Choon Yan and Wee Han Choo resided at No. 51 Jalan Besar Lama, Pasir Mas.

(e) The premises known as No. 112 Jalan Besar, Pasir Mas was never used by Chew Choon Yan and Wee Han Choo as a dwelling house but solely as a place of business.

(f) Chew Choon Yan died in 1956.

(g) On the death of Chew Choon Yan, his son paid the rent in respect of premises No. 112 Jalan Besar, Pasir Mas.

(h) In December 1959 plaintiff discovered that defendant was occupying premises No. 112 Jalan Besar, Pasir Mas. Defendant is the father of Chew Choon Yan's widow, Wee Han Choo. The father is the defendant in this case. He is a rubber dealer carrying on business at No. 112 Jalan Besar, Pasir Mas.

(i) On December 19, 1959 a notice to quit was sent on defendant.

The question for determination in this appeal is whether Wee Han Choo was the "tenant" of premises No. 112 Jalan Besar, Pasir Mas on the death of her husband Chew Choon Yan. "Tenant" as defined in the Ordinance means *inter alia* "the tenant of premises in respect of which a tenancy exists and includes a statutory tenant and the widow of the tenant who was residing with him at the time of his death". It is a fact that the widow Wee Han Choo was residing with her husband at No. 51 Jalan Pasar Lama, Pasir Mas at the time of his death. It is also a fact that the son of the deceased was occupying premises No. 112 Jalan Besar, Pasir Mas at the time of his death but ceased to occupy the premises in December 1959. Mr. Jayadeva for the appellant (the father of Wee Han Choo) argued that Wee Han Choo was the tenant of premises No. 112 Jalan Besar, Pasir Mas at the time of her husband's death as she was then residing with him. He further argued that the word "premises" in the definition of "tenant" did not indicate any particular premises and that so long as the wife was residing with her husband she became a tenant on his death of all the premises of which the husband was a tenant. I am unable to accept this view. The definition of "tenant" is quite clear. It means "the tenant of premises in respect of which a tenancy exists" and in this case the tenancy is in respect of premises No. 112 Jalan Besar, Pasir Mas. Mr. Jayadeva also contended that Wee Han Choo was in occupation of premises No. 112, Jalan Besar, Pasir Mas on the death of her husband. He based this contention on the authority of *The Mercantile Bank of India (Trustees) Ltd.* v. *Ruth Nicholas*[1] and *Kam Sam Mooi (f)* v. *Shin Heong Leong (f)*[2]. I do not think these cases are relevant. The facts in these two cases are entirely different. Mr. Jayadeva also referred to *Khadijah binti Abdullah* v. *S. I. A. Alsagoff*[3]. This is a Singapore case and therefore not binding on this Court. Furthermore the Singapore Ordinance is not identical with the Federation Ordinance. In any case I do not think this case is relevant.

I hold that the widow Wee Han Choo never resided with her husband at No. 112 Jalan Besar, Pasir Mas and was never personally in occupation of the said premises and therefore she was not a "tenant" of the said premises at the time of her husband's death.

The appeal is therefore dismissed with costs.

Appeal dismissed.

Solicitors: *Jayadeva & Zahir; H. L. Wrigglesworth & Co.*

ZUBAIDAH v. ZULKATHAR

[O. C. J. (Adams J.) June 30. 1962]

[Muar — Civil Suit No. 31 of 1961]

Contract — Agreement entered into after holding of panchayatt — Breach of condition, as to time of repayment — Defendant's 1/3rd equitable interest in land held in trust by plaintiff — Action for declaration that right to and interest of defendant in land had ceased — Contracts (Malay States) Ordinance, 1950, s.74.*

Land Laws — Equitable interest in land held in trust — Action for declaration of cesser of rights and interest.

The plaintiff was the registered owner of a piece of land. In 1943 for reasons which were not known the defendant (the plaintiff's brother) became the beneficial owner of a third undivided share in the land, but the defendant's interest was never registered. In 1956 a shophouse was erected on the land financed by a loan from a bank on the security of the land. The defendant was to have a one third share in the shophouse and the defendant agreed to bear responsibility for $3,500 towards his share of the shophouse. The plaintiff and her husband were to have the remaining two thirds share. The plaintiff subsequently began to press for money and as a result a *panchayatt* was held and some form of settlement of the financial transaction relating to the erection of the shophouse was reached. Subsequently an agreement was entered into by the plaintiff, her husband and the defendant by which the plaintiff agreed to pay off the defendant's debt with one C and his liability to the bank in consideration of a charge over the defendant's share in the property. The defendant was to forfeit his rights in the land if he did not pay off within three years. On the defendant being unable to repay towards the bank loan the plaintiff commenced proceedings seeking declarations that the rights to and interest of the defendant in the land have ceased and that the plaintiff is the absolute owner of the land and building thereof. The plaintiff also asked for an order to amend the Land Register by expunging the name of the defendant as being a joint owner of the building and by substituting her name as absolute owner thereof.

Held: (1) the only interest that the defendant had in the land and building was an equitable one, i.e. the plaintiff held the property as to one undivided third share in trust for the defendant;

(2) it was unconscionable to permit the plaintiff to obtain possession of the defendant's share, which was worth much more, merely because he had not been able to repay towards the bank loan.

Case referred to:—

(1) *Dwarika* v. *Bagawati* A.I.R. 1939 Rangoon 413.

* An assembly of men to try all disputes.

ACTION.

A. Miranda for the plaintiff.

K. Chelvanayagam for the defendant.

Cur. Adv. Vult.

Adams J.: This is an action by one Zubaidah binte Suleiman against her brother Zulkathar bin Sulaiman for a declaration that rights to and interest of the defendant in lands comprised in Johore Government Grants Nos. 15034 and 15035 (hereinafter referred to as the land) in the Township of Bandar Penggaram in the district of Batu Pahat together with the building thereon has ceased, secondly for a declaration that the plaintiff is the absolute owner of the land and the building thereon, thirdly for an order directing the Town Council of Batu Pahat to amend their registers by expunging the name of the defendant as being a joint owner with the plaintiff to the extent of a one-third share in the said building and substituting the name of the plaintiff as absolute owner thereof and fourthly there is the usual prayer for costs.

The defendant in his defence sets up the defence of *non est factum* on the ground that he signed the agreement of the 30th January, 1958, upon which the plaintiff bases her prayers under a complete mistake as to the nature of the document and he counterclaims for a declaration that the said agreement to which I have referred be declared null and void and to have it set aside. This is followed by a claim for accounts in respect to the rents and profits of the land and the building erected thereon.

I regret to say that I have found it extremely difficult to know what the truth of the matter is. Both parties and their witnesses have come to Court and have lied in a brazen manner. The plaintiff even found it necessary to prompt her husband when he was giving his evidence. I approach this case therefore well knowing that the majority of the witnesses are *prima facie* untrustworthy, and I can only accept that evidence which is spoken by a witness against his or her interest or where a fact is corroborated by other unimpeachable evidence.

The plaintiff Zubaidah is the registered owner of the land. In 1943 the plaintiff admits that the defendant became the beneficial owner of a third undivided share of the land. How or why is obscure, and the plaintiff says that it was out of the goodness of her heart. But having seen her, I very much doubt it. The defendant's interest was never registered in the Land Office and from then until now the plaintiff as far as the Land Office is concerned is the registered owner of the land absolutely.

In 1956 it was decided to develop the property by erecting a building upon it. This is a shop house and became known as 29A Jalan Omar. The plaintiff and her husband were to have a two thirds share in the building and the defendant a one-third share. The construction of the building was to be financed by a loan on the security of the land from the Oversea Chinese Bank, and of this the defendant was said to have agreed to bear responsibility for $3,500 towards his share of the one-third cost of the construction. Apparently there was not a contractor other than for labour, and the building was erected from materials supplied by the plaintiff, her husband and the defendant. It seems to be agreed that the defendant was in charge of the purchase of materials and the construction. I reject his statement that he did not draw on the loan account at the Oversea Chinese Bank. The account was shown to be in the joint names of the plaintiff's husband and the defendant.

It was said by the plaintiff and denied by the defendant that the defendant had used the premises after their construction for a business which had failed. This was amplified by the plaintiff's husband who said the business was a second hand motor car business. But at all events the defendant was being pressed for money by the plaintiff and a *panchayatt* was held on the evening of the 29th January, 1958. What was decided at that *panchayatt* or what it was about I am not prepared to say. From the wording of the agreement it would seem that there was some form of settlement of the financial transaction relating to the erection of the building.

On the following day, the agreement P.1 was executed by the plaintiff's husband of the first part, the plaintiff of the second part and the defendant of the third part. P.W. 4 Mohd. Amin bin Mohd. Salleh said that this agreement was signed in Mr. Mitra's office before Mr. Mitra. This witness struck me as being more reliable than any of the others. I would not have accepted the evidence of either P.W. 2 Mr. Nagalingam who described himself as Mr. Mitra's chief clerk or Mr. Tiew Ah Boon P.W. 3 also a clerk in Mr. Mitra's office without it. They would both have an interest in suppressing a grave irregularity if what the defendant said was true. Unfortunately, suspicious though the whole of this transaction is I came to the conclusion that the defendant's witness Mustapha bin Zockamet had neither attended the *panchayatt* nor was he present as he said he was at the defendant's house when the alleged signing of the document took place on 30th January. I therefore come to the conclusion that on the bare balance of probabilities the document was properly executed and that the defendant well knew what its contents were, and I reject any question of the plea *non est factum*. Not only did he sign this document but he also executed a memorandum of charge as he contracted to do under condition 2 of the agreement. He cannot ask me to believe that he also executed the memorandum of charge in ignorance of what he was doing.

What then is the purport of the agreement dated the 30th January, 1958? And what are the effects of its provisions?

Mr. Chelvanayagam argued that in the first place the second part of this agreement is a contract to repay money and that if it is not repaid, then his share in a house valued at least $18,000 becomes forfeit not to mention the land upon which it stands. This is not a valid pre-estimate of damages and is therefore not enforceable as it is a penalty. The only course open to the Court is to assess the damage to the plaintiff and award what the Court thinks just in cash. He suggested that what the Court should do would be to order payment of the capital sum and interest.

Secondly he argued that the relief claimed fell within the terms of the Specific Relief Ordinance and where damages were adequate compensation, the Court should so award.

The agreement to my mind confirms that there had been some prior settlement between the parties, and this would appear to confirm that some form of *panchayatt* had been held at which the rights and liabilities of the parties had been settled and agreed upon. By the agreement the plaintiff agreed to pay off the defendant's debt with the Chettiar in consideration of the execution of a charge over the defendant's property which was duly executed. Secondly the plaintiff agreed to pay off the whole of the debt to the Bank of which the defendant has admitted in the document that he was liable to pay a half, and the consideration moving from the defendant for the benefit accruing to him is that he promises to repay the sum within three years and in the event of his failing to pay the sum of $4,070 in full within three years from the date of the agreement, the defendant forfeits his right to his one-third share in the land and building. What the parties have said in effect in the agreement is that the plaintiff and her husband will pay off the Chettiar and take a charge over the defendant's land. They will take over the defendant's liability to the Bank of $4,070, for which he admits himself in the agreement which he has signed he is liable to the Bank if he promises to repay them. They then give him three years to repay the money and he promises that if he does not do so within that period he will forfeit his rights in the land and the building constructed thereon. It might also be noted in passing that the witness Mohd. Amin bin Mohd. Salleh, when asked what Mr. Mitra described the document P.1 as being, replied 'The lawyer described it as a bond I think.' I think that is exactly what the parties intended it to be. It was possible to execute a charge over the defendant's land in respect to the Chettiar's debt which the plaintiff discharged, but not possible to execute any charge over the beneficial one-third share in the land and building because the plaintiff is the registered owner of the whole. Therefore it would seem to follow that the undertaking to forgo his interest in the land was by way of added security. It was as it were as pledging. The case of *Dwarika* v. *Bagawati*[1] is referred to in *Pollock & Mulla*, Indian Contract & Specific Relief Acts (8th Edn.). Discussing the question of penalties under section 74 of the Contract Act which is *in pari materia* with section 74 of the Contracts (Malay States) Ordinance, 1950, the learned editor is of the opinion that in the light of sections 176 and 177 a term in a contract that a pledge should become irredeemable if not redeemed after a certain time is a penalty, and that the case was wrongly decided. In that case a defendant borrowed Rs. 100 at 2% per mensem and at the same time pledged two heifer buffaloes with possession and a term of the contract was that if they were not redeemed within a year the plaintiff should take possession of them. Mackney J. exercising the powers of revision said in relation to section 74 that the insertion of such a term was not in terrorem and could be enforced but seemed to think that it might not be so if the difference in value were large. I agree that case is not a pledge, I also agree that Mackney J.'s opinion is not the opinion of the learned editor of *Story* on Bailments who expresses the opinion that any term in the contract making the pledge irredeemable if the terms of the contract are not strictly complied with is null and void being a stipulation that is unconscionable. I only cite this as an example because both the law of mortgages and the law of pledges insist on the right to redeem being preserved. The only interest that defendant had in the land and building at the time of the execution of the Agreement P.1 was an equitable one. That is to say since 1943 the plaintiff had been holding the property as to one undivided third share in trust for the defendant. The plaintiff wished to use this as security for the repayment of the $4,070 which she was paying to the Bank on behalf of the defendant. That being so it would clearly be unconscionable to permit the plaintiff to obtain possession of the defendant's share merely because the condition of the contract as to the time of repayment had been broken. The sum secured is $4,070. The value of the building is admitted to be not less than $18,000 of which the defendant has an interest of one-third. The land, in which he also has an interest, is also worth something. It was suggested that it is worth about $40,000, but there was no evidence on this. The plaintiff, in value, therefore, would be obtaining very much more than the sum lent. I think this would be wrong. In my view all that the plaintiff is entitled to is judgment for the capital sum of $4,070 and reasonable interest from the date of the breach of contract that is the 31st January, 1961, until the date of this judgment. I think that reasonable interest would be 10 per centum per annum.

There will be judgment for the plaintiff for $4,070 and $577 which represents interest at 10 per centum per annum from the 31st January, 1961, to the 30th June, 1962, which makes a total of $4,647. The defendant must pay the costs of the action. The defendant's counterclaim is also dismissed and he must pay the costs. There will be the usual interest on the sum claimed and the costs at 6 per centum per annum.

Judgment for the plaintiff.

Counterclaim dismissed.

Solicitors: *Mitra & Co.; K. Chelvanayagam.*

THE CHINA ENGINEERS LTD. v. R.M. SAMY & THEE KENG CHOON (3rd Party)

[O. C. J. (Ong J.) July 18, 1962]

[K.L. — Civil Suit No. 181 of 1959]

Contract — Work done and goods supplied — Guarantee by defendant — Contracts (Malay States) Ordinance, 1950, ss.64 and 186 — R.S.C., O.16A — Third party — Counterclaim.

The plaintiff supplied tiles to and did the tiling in respect of the defendant's house which was being built by the third party, a contractor. The defendant himself selected the tiles and agreed to the rates quoted. He also guaranteed that he would make payment while the work was in progress. On the defendant failing to pay after the tiling was completed the plaintiff sued him. The defendant brought in the third party against whom he sought to be indemnified.

Held: (1) notwithstanding that the third party was an independent contractor in respect of the contract for the whole building, he was acting as the defendant's agent in respect of the tiling job;

(2) there was no obligation on the part of the plaintiff to demand payment while work was in progress, and therefore the defendant was also liable as guarantor.

CIVIL SUIT.

N. A. Marjoribanks for the plaintiff.

G. K. M. Mohan for the defendant.

T. C. Tang for the 3rd Party.

Ong J.: The plaintiff claims from the defendant the sum of $3,101.60 being the cost of material and labour charges for flooring and tiling work carried out at the defendant's request on his house in Jalan Lambah, Petaling Jaya, in 1958. The cause of action pleaded was that the goods and services were supplied to one Thee Keng Choon as the defendant's contractor and agent; further and in the alternative, that payment was guaranteed by the defendant under a letter of guarantee dated February 25, 1958 addressed to the plaintiff. That letter was as follows:

> "Proposed tiling on Lot 15/2 of my house Jalan Lambah, Petaling Jaya, K. Lumpur.
>
> I am directed to inform you that I guarantee payment of the above job if my contractor fails to make payment.
>
> Payment will be made by me or by my contractor while the work was in progress.
>
> I shall be grateful if you would commence the job as early as possible."

In a verbose defence of unnecessary length the defendant denied liability on a great variety of grounds, namely: (a) that the goods were not supplied to him; (b) that the letter of guarantee was for work and not for goods supplied; (c) that the plaintiff should have exhausted all remedies against the contractor before instituting action against the defendant; (d) that the contractor was not the defendant's duly authorised agent; (e) that the tiling work was performed between March 5 and May 31, 1958 and that payment was not demanded till after the tiling was completed and the last payment made by the defendant to his contractor, instead of while the work was in progress; (f) that variation of the term of the contract as to payment made between the plaintiff and the contractor without the defendant's consent discharged him from liability under the letter of guarantee; (g) that the extension of time given to the contractor to pay also discharged the defendant from liability as guarantor and (h) estoppel.

By a Third Party Notice the contractor was brought in as a third party and against him the defendant sought to be indemnified against any judgment given in favour of the plaintiff on the grounds following: (a) that shortly after the tiling was performed the third party failed to complete the building; (b) that the defendant's progress payments to the third party included payment for tiling, and the last payment made to the third party was on July 30, 1958, after the tiling had been completed; (c) that the third party had informed the defendant that he had fully paid for the tiling and thereby obtained the last payment on July 30. In addition, the defendant repeated his various other defences to the plaintiff's claim without any regard to their relevancy.

In the defence of the contractor, as third party, he stated that the contract price was $22,500 for the whole building but he had been paid only a total of $15,000; and that after completion of the building the defendant forcibly took possession thereof without settling the balance due to him. As to the tiling work, he stated that it was agreed between him and the defendant that the work should be done by the plaintiff, and the cost thereof payable by the defendant to the plaintiff should be deducted from the contract price. The third party further stated that in respect of the tiling job he was acting as the defendant's agent and he counterclaimed from the defendant a sum of $4,398.40 as the balance due to him after deducting the plaintiff's charges amounting to $3,101.60.

In the defendant's reply to the third party's counterclaim the defendant stated that he had paid a total of $19,000 to the third party; that after July 30, 1958 the third party ceased work to complete the building, as a result of which the defendant had to employ others to complete the works contracted for at a total cost of $3,084,